IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11037

JAMES H. COLLINS, SIDNEY FISCHGRUND, and CHRISTOPHER E. SCHIRM,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

COUNTER-STATEMENT OF THE CASE [1]

Appellants were indicted (with Fred V. Gordon and John H. Morgan) for violating the fraud provisions of the Securities Act of 1933 (Section 17(a) (1), 15 U. S. C. A. 77q(a) (1)), and the mail fraud statute (Section 215 of the Criminal Code, 18 U.S.C.A. 338) and for conspiring (with others not indicted) to violate these statutes (Section 37 of the Criminal Code, 18 U.S.C.A. 88). The indictment contained 11 counts, counts 1 and 2 each charging a specified use of the mails in the employment of a scheme to defraud in the sale of securities in violation of Section 17(a) (1) of the Securities Act; counts 3 through 10 each charging a

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[1] In our view the statement of facts set forth in Appellants' Brief is incomplete and does not accurately reflect the evidence.

specified use of the mails for the purpose of executing the scheme to defraud in violation of the mail fraud statute, and count 11 charging the conspiracy. Four of the mail fraud counts (3, 6, 7, 8) were dismissed. The jury found appellants guilty (on count 11) of conspiracy to violate the fraud provisions of the Securities Act and the mail fraud statute but not guilty on the substantive counts (R. 90-92). Defendants Gordon and Morgan were acquitted on all counts. The court suspended the imposition of sentence on appellants for one year without placing them on probation (R. 98-100). Appeals from these judgments were dismissed because the judgments were not final (148 F. 2d 338, March 14, 1945). The trial court resentenced each appellant to serve one year in a federal penitentiary, suspended sentence for two years and placed them on probation for two years (R. 118-22).

STATUTES INVOLVED

Section 37 of the Criminal Code, 18 U.S.C.A. 88, provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C.A. 77q(a)(1), provides:

> "It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud . . ."

Section 215 of the Criminal Code, 18 U.S.C.A. 338, in pertinent part provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . shall for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, . . . in any post office, . . . or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive . . . therefrom . . . any such letter, . . . shall be fined not more than $1,000, or imprisoned not more than five years, or both."

THE INDICTMENT

Count 11 of the indictment charged a conspiracy among appellants Collins, Fischgrund, Schirm and the other defendants Gordon and Morgan, together with E. Byron Siens, J. A. Barclay, Arthur P. Adkisson and Guy B. Davis, who were named as co-conspirators but not indicted,[2] and "other persons, whose names are to the Grand Jurors unknown", to employ a scheme to defraud in the sale of common stock of Union Associated Mines Company by use of the United States mails, in wilful violation of Section 17(a) (1) of the Securities Act, and to use the mails in furtherance of a scheme to defraud in violation of the mail fraud statute (R. 33-38). The acts and practices described in the first 10 counts (R. 2-33) are incorporated in the conspiracy count as overt acts in furtherance of the conspiracy. It was charged that the conspiracy existed continuously from about June 1, 1938, to about December 1, 1939 (R. 33).

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[2] Siens and Barclay died prior to the return of the indictment.

PERSONNEL

It will be helpful at this point to identify briefly some of the persons whose connection with the case is set forth below in the statement of facts.

Appellants [3]

James H. Collins: Underwriter and salesman of stock of Union Associated Mines Company ("Union"), a defunct Utah mining corporation. He was given an option on a block of stock in Union by Plymouth Oil Company ("Plymouth"), a California corporation organized by the conspirators and used to facilitate their scheme.

Sidney Fischgrund: Vice president and a director of and attorney for Plymouth.

Christopher E. Schirm: Participant in formulation of scheme and in acquisition of control of Union, and general adviser to others in the conspiracy.

Defendants who were acquitted

Fred V. Gordon: President of Plymouth; an oil man with offices in Los Angeles.

John H. Morgan: Secretary-treasurer and a director of Union; attorney with offices in Salt Lake City, Utah.

Co-conspirators

E. Byron Siens: One of the prime movers in the conspiracy; deceased at the time of the indictment.

J. A. Barclay: President of Salt Lake Stock Exchange and a securities dealer in Salt Lake City, Utah; deceased at the time of the indictment.

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[3] For the sake of clarity, Collins, Fischgrund and Schirm are referred to as "appellants", Gordon and Morgan, who were acquitted, as "defendants", and Siens, Barclay, Adkisson and Davis, not indicted, as "co-conspirators".

Arthur P. Adkisson: In the securities business in Los Angeles, mostly as a salesman.

Guy B. Davis: Secretary-treasurer, accountant and field supervisor of Plymouth.

Others

Christion Vrang: Geologist; shared office with appellant Schirm and defendant Gordon.

John McEvoy, Joseph Murphy and Logan Metcalf: Securities salesmen; operated with and under Collins.

R. A. Dunnigan: Attorney, sharing office with Fischgrund.

STATEMENT OF FACTS[4]

The evidence discloses a conspiracy and a scheme among the appellants, co-conspirators and others, to defraud the public by manipulating the market in the stock of Union and making false representations to induce the purchase of the stock at artificially inflated prices. The same evidence which proved the scheme also established the conspiracy to devise and employ the scheme. Thus in referring to evidence showing the operation of the scheme we thereby detail the proof supporting the conspiracy conviction.

The origin and nature of the scheme

Correspondence in July and August, 1938, in which appellant Schirm and defendant Morgan, an attorney with offices in Salt Lake City, participated, shows the formation of the scheme. The scheme was to acquire, with a minimum outlay of funds, control of a dormant mining corporation

[4] Where the Government's exhibits and Defendants' exhibits are not reproduced in the printed record, reference is made to the original exhibits transmitted to this Court (see R. 598). They are designated "GX" and "DX", respectively.

having a large amount of treasury stock and, because of having been listed on the Salt Lake Stock Exchange, being known to a substantial number of members of the investing public.

As a next step it was contemplated to organize an oil company which would undertake the drilling of an oil well, and to transfer interests in the prospective well to the mining corporation in exchange for treasury stock of the mining corporation. This was to be followed by market rigging operations in the stock of the mining company which were designed to raise the price of that stock in the over-the-counter market, to be followed by relisting that stock on the exchange in order to push up the price even more (R. 207-23; see R. 150, 560).[5]

In carrying out the conspiracy, Union, a defunct Utah corporation, was chosen as a suitable vehicle at Schirm's suggestion (R. 559). Union had been organized in 1929 to develop certain mining claims, and its stock had been listed on the Salt Lake Stock Exchange (GX 1, R. 140, 202). Its properties, however, had never been commercially devel-

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[5] Enclosed in a letter dated August 17, 1938, addressed to Morgan in Salt Lake City from Christion Vrang, a geologist who, with Schirm, shared the office of defendant Gordon in Los Angeles, was a "Proposed Plan to Finance an Oil Company", which reads in part as follows: ". . . a new company is out of the question if one desires to raise capital, therefore the only method is to secure control of an old company, preferably a mining company whose stock is or has been listed and thru advertising make the public become interested in the issue by drilling wells and telling about it in the papers. The old method of salesmen going and soliciting investors is obsolete. * * * the first thing to do is to form a holding company to operate thru * * * When a well is completed, or sooner if desired, the well is turned over to the mining company for stock, which in turn is placed on the market to raise new money. The mining company should be a native of a state which has liberal laws and stock can be readily marketed in several states. * * * In this manner the original holding company always has control of the mining company. Control of its own company which never sells a share of its stock, excepting the original shares that are issued to its original incorporators and control of the production" (R. 216-220).

oped; its right to transact business in the State of Utah had been forfeited and its charter suspended for non-payment of the annual corporation franchise tax (GX 6; R. 134, 135); and its stock had been delisted in 1936 for failure to file the required financial reports (R. 140, 202). Union did not have the necessary funds to pay a fee to an auditor to prepare these reports (R. 140). It had never paid any dividends on its stock (R. 134, 536), and had levied numerous assessments upon its outstanding stock between 1931 and 1935. Presumably through cancellation of outstanding shares of those who failed to meet assessments, the record shows that the assessments had resulted in the retirement of more than two-thirds of the outstanding stock to the treasury (GX 7; R. 135, 536). In August 1938, out of an authorized capitalization of 3,000,000 shares of 25¢ par value common stock, approximately 789,000 shares were outstanding, of which about 350,000 shares were held in Salt Lake City, and the balance scattered outside Utah (GX 7; R. 151, 200, 221). On September 2, 1938, a block of over 200,000 shares of Union stock, constituting working control, was purchased over-the-counter by the conspirators at about 2/5¢ per share (R. 151). The background of this purchase is set forth below.

Acquisition of control of Union

On August 19, 1938, appellant Schirm wrote a letter to defendant Morgan referring to Morgan's statement that 200,000 of the 350,000 shares held in Salt Lake City could be purchased, and advising Morgan that "one of us" would leave for Salt Lake City to negotiate the purchase if conditions were favorable (R. 221-2). In this letter Schirm also wrote that defendant "Gordon has an oil company of which he is president called the Plymouth Oil Co." which will obtain leases to oil lands, "start a well and turn same over to the Union Associated for a certain block of stock . . . The well would be known from that time on as the Union Associated well."

On the same day that appellant Schirm wrote this letter, appellant Fischgrund, defendant Gordon and co-conspirator Davis incorporated Plymouth under the laws of the State of California, with its principal place of business in the County of Los Angeles, for the stated purpose among other things of producing and dealing in oil and of dealing in securities "of other corporations" (R. 382-6, 531-2). Fischgrund, as vice president, Gordon, who was president but advanced in years, and, to a lesser extent, Davis, as secretary-treasurer, controlled Plymouth and were its sole directors, officers and stockholders throughout the period covered by the indictment (R. 523, 531, 533, 577, 578). Plymouth checks were signed by Fischgrund and Davis (R. 387). Although Plymouth had an authorized capitalization of 1,000,000 shares of 10¢ par value stock, only 1,000 shares were issued—400 each to Fischgrund and Gordon and 200 to Davis (R. 385, 531). No additional shares were ever issued (R. 531).

On September 2, 1938, the conspirators purchased in Salt Lake City 200,033 shares of outstanding Union stock for $800, or about 2/5¢ per share (R. 151, 167, 176, 196).[6]

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[6] The $800 was borrowed from one A. A. Julian who was promised, in return, $1500 in cash and some Union stock. An agreement was entered into by Julian, Siens and Adkisson, dated September 2, 1938, providing that the "200,000" shares of Union stock purchased by Siens and Adkisson were to be issued in Julian's name and delivered to him; that Siens and Adkisson were to sell enough of these shares to net Julian $1500, and that the balance of the shares was to be divided equally among the parties. The agreement further provided that Siens and Adkisson would cause Plymouth to consummate a contract with Union to drill a well in the Torrance oil field and assign to Union 50% of the proceeds, in exchange for 635,000 shares of Union's treasury stock, and that all the moneys received from the sale of any of these shares would be paid to Julian until he had received $1500 (R. 152-4).

However, Adkisson and Siens did not wait for the sales of stock, but at defendant Gordon's sugestion, borrowed $1500 from Gordon's nephew to repay Julian so as to obtain the stock held by him as collateral (R. 167-8). Adkisson testified that Siens wanted to get the stock out of Julian's hands as quickly

This purchase gave the conspirators control of Union (R. 138-9, 221-2) and they provided the necessary funds to reinstate its charter (R. 225, 230).[7] Holding this large block of Union stock, the conspirators were now in a position to dictate the transactions with Union resulting in their acquisition of large blocks of its treasury stock.

Acquisition of Union stock by conspirators

At a special meeting of the board of Union in Salt Lake City on September 6, 1938, Union accepted an offer of Plymouth to secure a drilling site in a producing area in the Torrance oil field, complete a well (No. 1) and deliver to Union 50% of the proceeds of the total production from said well in consideration of 635,000 shares of Union's treasury stock. Union accepted the offer (GX 6; R. 145). On January 4, 1939, the board of Union accepted an offer of Plymouth to drill another well (No. 2) in the Torrance oil field in exchange for another block of 635,000 shares of Union's treasury stock, and also agreed to accept an oil and gas lease in the Devil's Den area in Kern County, California, from one William S. Millener in exchange for 235,000 shares of its treasury stock (GX 6).

1. *Contract for well No. 1*

Pursuant to the September 6 resolution of Union's board, appellant Fischgrund and an office associate prepared the contract between Union and Plymouth, dated September 21, 1938 (R. 532-3), by the terms of which Plymouth,

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as possible because he was "afraid" Julian "would throw it on the market and hurt our market" (R. 167-8). Gordon then reimbursed his nephew by selling, on October 24, 1938, 40,000 shares of Union stock at 3¾¢ per share to four women who gave Gordon a check for $1500, payable to Plymouth (R. 173, 314-15; DX B). Gordon guaranteed the purchasers against loss and subsequently refunded their money (R. 172-3, 318, 580; DX F).

[7] Union's reinstatement became effective September 8, 1938 (GX 6; R. 134).

which had acquired an oil and gas lease on a tract of land in the Torrance oil field (R. 524), assigned to Union, in consideration of 635,000 shares of Union treasury stock, a 50% interest in the gross production of oil and gas from a well (No. 1) to be drilled on this tract.[8] Plymouth agreed to pay the drilling expenses and landowners' royalty with respect to this well (R. 252-3). The contract was signed in behalf of Plymouth by appellant Fischgrund and co-conspirator Davis (R. 254). This block of Union stock was issued in various denominations in the name of appellant Schirm, who endorsed the certificates for sale to the public (R. 175, 184-5, 195).[9]

It will be noted that under this initial contract with Union, Plymouth not only conveyed a 50% interest in the well, but also undertook to pay 100% of the drilling expenses even though Plymouth and the conspirators acquired only part of the outstanding stock of Union, leaving in the hands of the public almost one-half of Union's outstanding stock. Thus, the conspirators had in effect given to the holders of the outstanding shares of Union nearly a 50% interest in one-half of the profits, if any, from well No. 1 for no rational consideration. The only apparent explanation for such an arrangement is the conspirators' expectation that it would facilitate unloading the Union stock held by Plymouth and the conspirators at prices inflated through market manipulation.[10] Had there been a straightforward and bona fide oil drilling venture the promoters would have

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[8] Under the contract, Plymouth in addition assigned 25% of its interest in the oil and gas leases on the Factory Center and Lomita Tracts in Los Angeles County (R. 141, 143, 251-2, 255-6). It does not appear that Union derived any income from these interests (see R. 419).

[9] As of August 23, 1939, 499,000 of the 635,000 shares issued to Schirm were held by 42 different individuals; the balance was in the name of Schirm (R. 196).

[10] As we show below (pp. 17-18), the return to Union under this contract enabled it to pay a dividend, which was in furtherance of the conspiracy, although the well-drilling enterprise as a whole was operated at a loss.

retained for Plymouth a 100% interest in any profits and would have made direct offerings of Plymouth's stock only to the extent necessary (R. 537). The record contains a number of indications that the oblique form of the promotion was designed to avoid the requirements of the Securities Act or requirements of state laws applicable to public offerings of security issues.[11] The transfer of the interest in the well in exchange for the stock of a defunct mining company which had no value seems consistent with the purpose to manipulate the market in the mining company stock (see R. 242), rather than to carry on a legitimate oil and gas development.

2. *Devil's Den Lease*

On December 29, 1938, defendant Gordon and others leased to one William S. Millener, an occupant of Plymouth's office suite (R. 475), a 40-acre tract located in the Devil's Den area of Kern County, California (R. 264-83, 578-9). This lease was prepared by appellant Fischgrund (R. 553). Millener's tenure under the lease was conditioned upon drilling a well on the tract within a prescribed period of time (R. 266). Shortly thereafter, Millener, who served as a dummy in the transaction (R. 572, 579), assigned the lease in blank and left the lease with Fischgrund and his associate, who had prepared the assignment (R. 81). Subsequently, Union was made the assignee (GX 6, 7). On February 25, 1939, Union issued a certificate for 235,000 shares in the name of Millener, and on March 6, this certificate was broken up and the shares issued in the name of the Dunnigan Estates, Inc., R. A. Dunnigan, with whom

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[11] "Of course, I realize this could not be set up before the Corporation Department or the S. E. C." (R. 243-244; see also R. 217). Violation of the registration requirements of the Securities Act was not charged in the indictment and it is unnecessary to express an opinion as to whether these requirements were successfully circumvented.

Fischgrund shared an office, and A. A. Julian (R. 195).[12] All the shares issued to Dunnigan Estates, Inc., and about two-thirds of the shares issued to Dunnigan appear to have been disposed of (R. 195-6).

Two officials of the State of California, who qualified as experts (R. 328, 336, 343), testified to the unfavorable prospects of the tract for the profitable production of oil (R. 336-7, 345). The deputy state oil and gas supervisor and petroleum engineer for Kern County testified that his records showed that the total of oil production from oil wells in the Devil's Den area for 1938 and 1939 averaged about 1 barrel of oil per well per day and that a dry hole had been drilled in the vicinity of the tract (R. 331, 334-5). The chief appraisal engineer of Kern County, who also served as assistant county assessor, and whose duties included the evaluation of oil and mineral rights, testified that he placed no valuation upon the oil and mineral rights of the tract in question in 1938 and 1939 (R. 345). No well was completed on this tract (R. 419).

3. Contract for well No. 2.

On January 5, 1939, Plymouth entered into a contract with Union by which Plymouth agreed to drill a well (No. 2) on a lot adjacent to well No. 1 in the Torrance field and to assign to Union one-half of the gross production from this well after the payment of drilling expenses and landowners' royalty had been deducted, in exchange for 635,000 shares of Union treasury stock (R. 257-62). The contract exempted these shares from the payment of the first dividend to be declared by Union (R. 262). Appellant Fischgrund and his associates prepared the contract for Plymouth and it was executed in behalf of Plymouth by

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[12] Millener, in an affidavit dated December 28, 1940, stated he gave no consideration for the lease from Gordon, and received none for his assignment in blank. He recalled signing several documents in connection with the assignment, but could not say whether a Union stock certificate was among them (R. 81-2).

Fischgrund and co-conspirator Davis (R. 260, 532). This block of Union stock was issued in one certificate in the name of Plymouth (R. 195); the certificate remained intact and was not sold to the public (R. 144, 195).

Manipulation of the over-the-counter market in Union stock

The conspirators laid the ground work for the operation of their scheme by acquiring control of Union and transferring large blocks of its stock to Plymouth or their nominees. Beginning shortly after the well No. 1 contract was entered into, they manipulated the market in order to inflate the price of the stock. As a result of these manipulative activities, the over-the-counter price of Union stock was artificially raised one thousand percent from a fraction of one cent (about 2/5¢) a share on September 2, 1938, when control of Union was acquired by the purchase of 200,033 shares, to 4¢ a share in March 1939, and held at about 3¢ until August 1939.

1. *"Cleaning up the cheap stock"*

The first step in the manipulative activities of the conspirators was to "clean up the cheap stock that was on the market" and stop any selling of Union stock (R. 169). The conspirators were apprehensive that sales of the shares at this time would depress the market and interfere with their efforts to raise the market price of the stock (R. 169, 170). Co-conspirator Barclay,[13] president of the Salt Lake Stock Exchange, agreed to lend his assistance and also promised to get brokers interested in the stock (R. 169). He suggested to Adkisson that a letter be sent to Union's stockholders requesting them not to sell their holdings (R. 169). On September 29, 1938, shortly after the date of the Plymouth-Union contract with respect to well No. 1, Union sent a letter to its stockholders praising the prospects of this venture and urging them to hold their shares (R. 145-7).

[13] Deceased at the time of the indictment herein.

Barclay also suggested that Adkisson clean up the cheap stock by placing a bid with him at 1¢ a share and, when the stock offered at that price was purchased or if none was offered, raising the bid progressively (R. 169-170). The procedure was aptly described by Adkisson (R. 169, 189):

> "In starting a market operation, the first thing you have to do is acquire your stock at the cheapest price, lower than you expect to bid for it to begin with. You have that incentive of having a block of stock which you want to make valuable.
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> * * * *
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> ". . . By placing progressively higher bids that affects the market so as to cause it to rise; and by raising the market price in that fashion I would say that that was rigging the market . . ."

Pursuant to Barclay's suggestion, Adkisson placed 10 progressively higher bids with Barclay from the end of September 1938 to the end of the year, on behalf of himself, appellant Fischgrund, co-conspirator Siens, and Fischgrund's office associate (R. 170, 356-62). The opening bid was 1¢, which was ultimately increased to 2½¢.[14] During this period 10,000 shares were acquired, at 1½¢ per share, and stock was sold at a high of 3¾¢ per share on October 24, 1938 (R. 170, 358).[15]

These bids had no relation to the merits of the investment or the price at which the stock would have sold in a free and competitive market (R. 189). Union's only income throughout the period of the scheme was derived from its interest in well No. 1 (R. 142-3), the site for which had not even been finally selected until about October 15, 1938 (G 14: letter from Siens to Morgan, dated Oct. 15, 1938).

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[14] On September 27, 1938, Adkisson writing from Los Angeles to Barclay in Salt Lake City, said (R. 362): "I quite agree with you that we are pushing the market too fast and so will instruct you to do as you suggested, that is to bid 1½ cents but if any is offered at 2 cents to take it."

[15] See note 6, *supra*.

Yet the high of 3¾¢ during this period was reached in the latter part of October 1938, before drilling operations had been commenced (R. 171, 451).[16]

2. *Telegrams to Salt Lake Stock Exchange*

Plymouth commenced the drilling of well No. 1 on November 9, 1938, and completed drilling November 30, 1938 (R. 451). At Barclay's suggestion, co-conspirator Adkisson sent him numerous telegrams from Los Angeles enthusiastically describing the progress of the drilling operation, and Barclay posted them on the bulletin board on the floor of the Salt Lake Stock Exchange (R. 158, 170-1, 181-183). The acknowledged purpose of these telegrams was to stimulate the interest of brokers in Union's stock (R. 171). This device followed the pattern outlined by appellant Schirm in a letter to Morgan dated August 12, 1938 (R. 215);

> ". . . It is my purpose . . . to get the proper publicity under way to stimulate stock sales."

However, a few days before well No. 1 came in, Barclay suggested that no more telegrams be sent because they had been understood to reflect promotional activities, and might hamper his efforts to get Union's stock relisted on the Exchange.[17]

Oil was first produced from well No. 1 on December 14, 1938 (R. 451). The well's highest production per day, 124 barrels, was reached the next day, December 15, 1938 (R. 451, 485).[18] Neither the publicity given by the conspirators

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[16] Barclay attributed the failure of the stock to rise according to expectations to the influx of selling orders from Los Angeles which depressed the Salt Lake market (R. 190, 371-2).

[17] (GX 15; Letter dated Dec. 12, 1938, from Morgan to Siens; see R. 573).

[18] The total production for January 1939 was 2581 barrels. The highest day's pumping during that month was 120 barrels. By December 1939 the well had declined to a day's high of 16 barrels and the total production during that month was 248 barrels (R. 485).

to the drilling nor the production resulting from the well adequately fulfilled the intended effect with respect to the market manipulation.[19] Adkisson therefore withdrew from the scheme in January 1939 (R. 174). But the other conspirators persisted in the scheme as we shall see.

3. *Appellant Collins' participation in scheme—the graduated price scale contract*

That the conspirators persisted in their scheme to manipulate the market in Union stock is graphically shown by the contract between appellant Collins and co-conspirator Siens in behalf of Plymouth. The contract was prepared by appellant Fischgrund. It was executed January 17, 1939, and provided for the sale to Collins by Plymouth of 1,000,000 shares of Union stock in 12 equal monthly installments commencing on or before February 1, 1939, and terminating on or before January 1, 1940. The prices to be paid by Collins for the stock ranged from 2½¢ per share for the first installment up to 30¢ per share for the last installment (R. 284-90).[20]

It is clear that for Collins to unload the stock purchased under this contract at a profit, the price of the stock had to

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[19] On December 9, 1938, five days before well No. 1 came in, Barclay wrote to Adkisson:

"I want to congratulate you upon the messages the Plymouth Oil Company are sending to the Stock Exchange.

"These messages would be most effective in making people become interested in UNION ASSOCIATED MINES COMPANY were it not for the fact that when every time a wire is received there also comes selling orders out of your end and you know that just kills the whole picture for if the controlling parties do not show an interest in the upward movement, what do you expect others to do?" (R. 371.)

This would seem to indicate that some of the conspirators were unloading shares for their own account, resulting in a drag on the general manipulative effort.

[20] Prior to this contract of January 17, 1939, Fischgrund had prepared two contracts of a similar nature between Collins and Plymouth (R. 533). These contracts are not in the record.

rise progressively higher, always above the price Collins had to pay for it under the contract in each succeeding month, until on completion of the contract the initial price would have been inflated over 1200%. Collins, Fischgrund testified, did not know much about the oil business but was experienced in the sale of stock (R. 550). It is apparent that Collins had succeeded to Adkisson's role in the manipulative phase of the scheme (R. 476-80). Collins employed Joseph Murphy, John McEvoy, a former attorney engaged in the securities business, and Logan Metcalf to assist him in the sale of Union stock (R. 291-2, 294, 295-6, 313, 409, 424, 448).[21] According to McEvoy, Murphy "was an even partner with Collins in this contract" (R. 310). Fischgrund testified that Collins, Murphy and McEvoy were joint venturers under the contract (R. 550).

The graduated scale of prices fixed by the contract was, of course, arbitrary and had no relation to the assets of Union or to the production records of the wells in which the company had an interest. Union's interest in well No. 1 yielded $4,115.22 to Union (R. 418),[22] part of which was disbursed in a 1/10¢ dividend on August 30, 1939 (GX 6). This dividend was declared over the objection of a director of Union who had been such since 1935 (R. 130), that the money should be used "in developing the business" of Union (R. 140), and despite the fact that the production of oil from the well was rapidly diminishing. This yield to Union was approximately one-half the total proceeds from the oil produced by this well up to that time, which amounted to $8241.44 (R. 418). The cost of drilling the well, approximating $38,000 (R. 582), was borne by Plymouth under its contract with Union (R. 252). In addition, under

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[21] McEvoy testified that he occupied an office with Collins and Siens in the Plymouth suite, which adjoined Fischgrund's law office, "to interview anybody that might be interested in" Union stock (R. 296, 313).

[22] This was more than Union had received in all the years it owned mining property (R. 139).

the terms of the contract, the 20% landowners' royalty was deducted from Plymouth's share (see GX 39; R. 388). It is quite apparent that this oil operation was being conducted at a loss, and that Plymouth would not have been in a position to pay an earned dividend on its own stock. The transfer of one-half of the returns to Union, however, put Union in funds which enabled the conspirators to cause Union to declare a dividend in order to boost the price of Union stock,[23] when in fact the well was being operated at a loss. Indeed, the sum so transferred would not have been sufficient to pay this dividend on all the stock outstanding. Fischgrund arranged matters so that 635,000 shares of Union were excluded from the dividend (GX 15: Letters of Morgan to Fischgrund, April 28, May 5, May 10, 1939). Union received no income from the oil produced by the No. 2 well because the total proceeds from its production were insufficient to pay Plymouth's drilling expenses (R. 144, 257-62, 419).[24]

4. *Misrepresentations in sale of Union stock*

Collins agreed to sell Union stock to McEvoy at or near the prices paid by Collins under his contract, and McEvoy was to make his profit on sales to the public (R. 294, 299-300).[25] McEvoy was told by Collins, Murphy and Siens that Barclay could be depended on to drive the price up when

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[23] On December 28, 1938, Adkisson wrote to Barclay: "Have been quite keenly disappointed in the way Union Associated Stock has acted and probably we will have to pay a dividend or bring in another well before the stock will show any signs of life" (R. 374).

[24] Well No. 2 opened February 28, 1939, at 156 barrels for the day (R. 471-2) and by December 1939 had declined to a day's high of 20 barrels (R. 486).

[25] Fischgrund testified he later prepared a contract between Collins, Siens, McEvoy and Murphy incorporating an agreement to split Collins' profits under his stock purchasing contract between the parties (R. 552-3).

the stock was listed on the Salt Lake Stock Exchange;[26] that well No. 1 was producing about 350 barrels per day;[27] and that the stock would open at about 10¢ and should in time rise to $5 or $10 per share (R. 292-4). McEvoy thereupon purchased from Collins 12,000 shares at 2½¢ per share, which he split with a friend (R. 293, 302). Later, Barclay told him in the presence of Collins, Murphy and others that he thought the stock would open at 25¢ a share; and when production started on well No. 2, McEvoy was told in the presence of Collins, Murphy and Millener that this well was producing about 500 barrels a day, and that production could be pushed up to 1,000 barrels a day (R. 297).[28]

From January until March, 1939, McEvoy sold his 6,000 shares and additional shares at a profit, and for a price as high as 4¢ a share in March 1939, by repeating to his customers these and similar representations made to him (R. 294, 296, 298, 302-3, 316, 416-7). Collins, Murphy and

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[26] The application for the relisting of Union stock which was filed with the Exchange in January 1939 was not successful (R. 202). On January 18, 1939, Barclay, as president of the Salt Lake Stock Exchange, notified the Securities and Exchange Commission that Union had filed an application for registration of its stock on the Salt Lake Stock Exchange on January 17, 1939, and that the application had been approved. This notice was received by the Commission January 31, 1939. Pursuant to the Commission's request, the "certification" of registration of Union's stock was withdrawn February 21, 1939, pending further investigation by the Commission (GX 7; R. 572).

[27] This figure exceeded by 125 barrels the estimate of 225 barrels made by co-conspirator Davis on December 14, 1938, as the daily production of the well "as it was flowing by heads" (R. 557). Davis, who "told certain members of the Plymouth Company in the office" his "conclusion as to the initial production of the well" (R. 555), admitted it was "rather hazardous to estimate the production of a well which flows by heads" and said this accounted for the discrepancy between his estimate and the actual intial day's production of 124 barrels (R. 557).

[28] As noted above, well No. 2 opened at 156 barrels for the day and rapidly declined to a day's high of 20 barrels by December 1939.

Metcalf made similar misrepresentations directly to customers with respect to both wells No. 1 and 2, and these customers in reliance thereon purchased stock from them or from McEvoy (R. 390-2, 409, 411, 414, 424-5, 426, 428-9, 446, 472).[29] Altogether, from January until March, 1939, Collins and his associates sold about 165,000 shares of Union stock to the purchasers who testified at the trial (R. 316, 392, 410-11, 415, 425, 445, 472).

Lyman Cromer, partner in a brokerage firm in Salt Lake City (R. 155), was told by one of the conspirators in September 1938, that Union stock would "in a short time, as soon as this drilling had started, . . . go up in leaps and bounds and for me to get in at that time and tell my customers about it"; that when re-listed it would open at 25¢ a share; and that the stock was expected to rise to $2 or $3 per share (R. 156-7). Later, he was told that well No. 1 had come in at about 1,000 barrels and was the "best well they had brought in in this field" (R. 159). Cromer became suspicious of these statements (R. 159, 160), but was reassured by a statement that Union would pay a dividend from the money derived from the well (R. 159) and that the stock was a "good proposition" (R. 162). On the strength of these representations, Cromer's firm purchased a total of about 200,000 shares of Union stock for its cusomers, at an average price of 3¢ per share, from December 14, 1938, when well No. 1 came in, to August 1939 when the dividend was paid (R. 160, 162-3). In addition, Cromer and his partner each purchased about 25,000 shares for their own accounts (R. 162, 166).

Use of the mails and of interstate commerce

The use of the mails to transmit the letters received in evidence as Government exhibits is clear (R. 203, 205,

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[29] Lewis J. Hampton, who purchased 15,000 shares from the Collins group, testified that "while Collins, McEvoy and Murphy were present, it was stated that Plymouth well No. 2 was producing 550 but that it was good for a thousand barrels on a test" (R. 392).

325-6, 406-7, 425). Moreover, by reason of the geographical separation of the conspirators and their confederates, and the distances between them, the use of the mails and of interstate commerce was necessary to carry out the scheme. Appellants Schirm, Fischgrund and Collins and co-conspirators Siens, Adkisson and Davis operated from Los Angeles, where the offices of Plymouth and the Torrance oil field were located. The offices of Union and of defendant Morgan were located in Salt Lake City where co-conspirator Barclay also functioned as president of the Salt Lake Stock Exchange. Altogether, Morgan received over 50 letters and telegrams from Los Angeles in connection with the scheme (GX 14, 15). Over 31 letters and telegrams between Barclay in Salt Lake City and Adkisson in Los Angeles are in evidence (GX 9, 16). Frequent trips were made by the conspirators between the two cities in furtherance of the scheme (GX 6; R. 131, 150, 151, 161, 570, 571, 573).

ARGUMENT

I

The Evidence Was Sufficient to Sustain Appellants' Conviction of Conspiracy

Appellants' main contention, under assignments of error IV and V, is that there was no evidence under the indictment to sustain their conviction of conspiracy (Br. pp. 21-2, 34). In determining whether the evidence was sufficient to support conviction, the appellate court will not weigh the evidence or determine credibility of witnesses but will take that view of the evidence with inferences reasonably and justifiably to be drawn therefrom most favorable to the government. *Suetter* v. *U.S.*, 140 F. 2d 103, 107 (C.C.A. 9, 1944); *Holmes* v. *U.S.*, 134 F. 2d 130 (C.C.A. 8, 1943), cert. denied 319 U.S. 776; *Hemphill* v. *U.S.*, 120 F. 2d 115, 117 (C.C.A. 9, 1941), cert. denied 314 U.S. 627; *Zottarelli* v. *U.S.*, 20 F. 2d 795 (C.C.A. 6, 1927), cert. denied 275 U.S. 571; *Shama* v. *U.S.*, 94 F. 2d 1 (C.C.A. 8, 1938), cert. denied 304 U.S. 568.[30]

The evidence in the case has been set forth in detail in the statement of facts. However, a brief review of the evidence with particular attention to appellants' participation in the scheme will, we submit, show there was ample evidence to sustain the verdict and that the trial court properly refused to take the case from the jury and direct a verdict of acquittal.

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[30] "A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict." *Abrams v. U.S.*, 250 U.S. 616, 619; *Burton* v. *U.S.*, 202 U.S. 344; *U.S.* v. *Bronson*, 145 F. 2d 939 (C.C.A. 2, 1944); *U.S.* v. *Feinberg*, 140 F. 2d 592 (C.C.A. 2, 1944), cert. denied 322 U.S. 726; *Roberts* v. *U.S.*, 96 F. 2d 39 (C.C.A. 8, 1938).

The record is replete with evidence disclosing that these appellants originated or joined in a fraudulent stock selling scheme in order to enrich themselves at the expense of gullible and unsuspecting investors. The evidence establishes a scheme to manipulate fraudulently the market in the worthless stock of Union Associated Mines Company, a defunct mining corporation whose stock had once been listed on the Salt Lake Stock Exchange. Running through the correspondence of the conspirators, months before any oil was produced by the oil wells in which Union was assigned an interest by Plymouth, is language which is consistent only with a fraudulent scheme to manipulate the market in Union stock (GX 15, 16). Below are a few excerpts from this correspondence showing the fraudulent intent and purpose of the conspirators to massage the market:

July 29, 1938: "I also have in mind acquiring a Utah Corporation that is already listed on the exchange, which we could use to move some stock" (R. 207).

August 15, 1938: "With the right kind of set-up I feel quite sure that considerable stock could be moved here in Salt Lake" (GX 15).

September 26, 1938: ". . . as regards the market—you are pushing it too quickly to get any stock at the low prices . . . Unless you want me to push it up to 2¢ bid, let me know, but my idea is to just let the price drag for a few days . . . Now, as I understand your orders, they are to buy up to 50,000 shares @ 2¢" (R. 356-7).

September 27, 1938: "I told him that if he would stop people from selling we would get this stock up to 5 to 7¢ and there was no sense in having people buy the stock @ 1½ or 2¢" (R. 358-9).

September 27, 1938: "I quite agree with you that we are pushing the market too fast and so will instruct you to do as you suggested, that is to bid 1½ cents but if any is offered at 2 cents to take it" (R. 362).

September 28, 1938: ". . . as we understand it now, your orders are to buy 25,000 shares UNION

ASSOCIATED MINES @ 1½¢ but if any is offered at 2¢ to take it" (R. 360).

September 29, 1938: "We will . . . endeavor to handle the market so that investors will gradually acquire not only interest but confidence" (R. 364).

October 1, 1938: "Will support the market at this end and it looks as if the price is now coming up to a figure justified to a certain extent by the interest in the Company" (R. 365).

October 3, 1938: "Market here cleaned up. Think prices climbing too fast if price gets too high outside stock will come in and cause severe drop. Feel advisable for me to write outside stock and offer 3 cents (or whatever you think best). This would give better control of market . . ." (R. 368).

October 10, 1938: "I have received a number of calls in way of explanation of the Union Associated deal. I find that the response is much more favorable if it appears that the Union Associated acquired some California oil lands and then made a deal with the Plymouth Oil Company for drilling. It sounds too much like a purely stock deal for the Plymouth to furnish the land and the drilling also" (R. 242).

October 10, 1938: "On the Union Associated deal it would appear better for the Union Associated to have acquired the oil land and then they could make an agreement with the Plymouth Oil Co. for development (at least as far as newspaper publicity is concerned. Of course, I realize this could not be set up before the Corporation Department or the S.E.C.") (R. 243-4).

October 14, 1938: "Certificate 3452 for 10,000 shares in the name of Chris Schirm was sold by Barclay today at 3¢. This, I think, makes the second 10,000 share certificate sold by him at that price. I don't know just what your present plans are, but I am sure the stock could be sold here at 5¢ as easily as it could be at 3¢, if Mr. Barclay would show a little

> strength at 5¢. The brokers all know that Barclay is representing the California brokers and if he is selling at 3¢ the market goes down immediately. If he is bidding 5¢ the market could easily go to 5¢ . . . I think you have the local market practically cleaned up and with a little strength shown, I believe the market could easily go to 5¢ or higher. Please don't think I am trying to tell you how to handle the market, but I thought you were entitled to the facts as they have come to me" (R. 433).[31]

It is clear that Union was to be used as a front in the market operations of the conspirators. The broad outline of the scheme is disclosed in correspondence, in which appellant Schirm participated, in July and August 1938, and was succinctly set forth in a "Proposed Plan to Finance an Oil Company" sent to Morgan on August 17, 1938.[32] Pursuant to this scheme Schirm chose Union as a suitable corporation for carrying out the scheme and arranged the details with Morgan for acquiring control of Union. On August 19, 1938, Schirm wrote (R. 221-2) :

> "Answering your letter of August 17th in which you state that the Union Associated has 700,000 shares outstanding and that 350,000 is owned in the East and 350,000 in Salt Lake and that we can get 200,000 of this 350,000 Salt Lake shares. Who will own the other 150,000 of the Salt Lake shares and would they play with us? Or would they tear down our market? Are they the same people we would buy from?
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> ". . . For your information, here is the way we will operate here. Mr. Gordon has an oil company of

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[31] It may be noted that co-conspirators other than appellants carried on much of this correspondence. It is clear, however, that this correspondence dealt with a phase of the manipulative program the execution of which was assigned to said co-conspirators as part of the overall conspiracy, and being in pursuance of the conspiracy, was therefore binding on all participants therein, including appellants.

[32] See note 5, *supra*.

which he is president called the Plymouth Oil Co. . . . The Plymouth Oil Co. will take leases and start a well and turn same over to the Union Associated for a certain block of stock and guarantee to complete the well. The well would be known from that time on as the Union Associated well. Under these conditions do you think the Salt Lake brokers would wake up and take an interest in this stock and try to sell it?

"One of us will leave here not later than next Tuesday morning if you think we can do some business there. We will have with us a Los Angeles broker who can and will talk broker language to your people and the Los Angeles brokers will do their part . . ."

The conspirators acquired stock control of Union, revived it, and then transferred large blocks of its treasury shares to Plymouth in return for interests in oil wells acquired by Plymouth. The formation of Plymouth by the conspirators and the transfer of Union's stock to it was a step in the scheme to impart a fictitious appearance of value to Union stock. Plymouth served as a conduit for the conspirators to acquire and then unload this stock on the public. As is generally the case in such stock selling schemes, fraudulent representations were made to induce investors to buy.

Plymouth was incorporated on August 19, 1938, by Fischgrund, Gordon and Davis who controlled the corporation as its sole directors, officers and stockholders. Together they held only 1000 shares out of an authorized capitalization of 1,000,000 shares, and no additional shares were issued.

Control of Union having been acquired by the conspirators, large blocks of its treasury stock were transferred to Plymouth or its nominees for interests in two oil wells and in a tract of oil land. Fischgrund and Siens acted in behalf of Plymouth in these transactions.

The first 635,000 share block of Union stock was issued in Schirm's name and he endorsed the certificates for

sale to the public. As of August 23, 1939, Schirm still held 136,000 shares (see note 9, *supra*).[33]

The agreement between Plymouth and Union with respect to well No. 1 is significant because it demonstrates that here was not a legitimate oil well promotion but a prelude to manipulating the market in Union stock. Plymouth gave something of value—a half interest in a well—to an empty shell for a large block of its worthless stock.[34] In addition, Plymouth was to pay the drilling expenses. It borrowed the money to pay these expenses (R. 539). The sale of Union stock was not required to develop the lease. It is clear that if a legitimate oil well promotion had been contemplated, there would have been no need to bring Union into the picture. If Plymouth had not conveyed a half interest in the well to Union and the well had been a profitable producer, Plymouth's own stock would have been quite valuable. By the clever device of making Union an equal partner in the gross income from the well with Plymouth itself paying the overhead and suffering any losses in operating it, the conspirators were giving Union the appearance of a successful enterprise so that its stock could be foisted on the public.

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[33] This would tend to contradict appellants' assertion that there is no evidence of Schirm's ever receiving any stock for his participation in the transaction (Br. 26).

[34] Appellants contend (Br. 32) that according to the opinion testimony of defendants' witness, Wents (R. 516), the interest in well No. 1, which Plymouth assigned to Union, was worth about 10¢ per share for the 635,000 share block of stock transferred to Plymouth, and ask, "Where is the fraud?" However, it is not charged that Union was defrauded, but rather that the purchasers of Union stock from the conspirators were defrauded.

Appellants state that every stockholder who purchased stock on the strength of the Plymouth transaction, was offered and did receive, when it was requested, their money back with interest at the rate of 6% (Br. 32). However, as the evidence shows, this offer covered only those certificates which "coincided with certain numbers" (R. 163). Moreover, this is no defense and certainly does not reach all those intended to be defrauded.

Fischgrund's participation is also shown by the fact that he negotiated the acquisition by Plymouth of 235,000 shares of Union stock in return for the assignment to Union of the Devil's Den lease, and the acquisition of 635,000 shares for the interest in well No. 2.

After the first acquisition of Union stock by Plymouth, the conspirators commenced the manipulative phase of the scheme which resulted in artificially raising the over-the-counter price of the stock from 2/5¢ to 4¢ per share, an increase of 1,000%, and was intended to raise the price ultimately to over 30¢ a share. The first step was for the conspirators to clean up the cheap stock on the market. Then, to discourage the sale of Union stock, Union was caused to send a letter to its stockholders urging them not to sell their shares. Progressively higher bids were placed in order to remove from the market any stock offered at low prices.

Appellants refer to the fact that Adkisson, a government witness, testified on cross examination that this device of cleaning up the cheap stock is not rigging the market (Br. 29; R. 187).[35] Apart from the doubtful competence of such testimony with respect to one of the ultimate questions of fact in the case, this statement deals only with one step in the manipulation;[36] moreover, on redirect examina-

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[35] Obviously, the jury was entitled to believe such part of any witness' testimony as it chose. In *U.S.* v. *Palese,* 133 F. 2d 600, 603 (C.C.A. 3, 1943) the court said: "It is true that courts have held under other circumstances that a party is bound by the testimony of a witness whom he produces. We think that rule does not apply to prosecutions in a criminal case, however. In such a case the Government does not necessarily give credence to a witness merely by introducing him, for it is the duty of the prosecution in a criminal trial to produce and use all witnesses within reach of process, of whatever character, whose testimony will shed light on the transaction, whether it makes for or against the accused." Adkisson's adverse interest is apparent.

[36] The fraudulent nature of the device of cleaning up cheap stock as a step in a manipulation scheme has been recognized in *Koeppe & Co.* v. *S. E. C.,* 95 F. 2d 55 (C.C.A. 7, 1938).

tion by the government, he admitted that "placing progressively higher bids . . . affects the market so as to cause it to rise; and . . . that is rigging the market" (R. 189). He testified that he placed ten progressively higher bids with Barclay during the last three months of 1938 on behalf of himself, appellant Fischgrund and others. These bids had no relation to the merits of the investment, but were placed merely to raise the price of Union stock, in which effort the conspirators were successful up to a certain point. They sold Union stock at a high of 3¾¢ per share on October 24, 1938, before drilling operations had started on well No. 1 and before Union had received any income.

When drilling was commenced on well No. 1, the conspirators, following the pattern set by appellant Schirm, started a barrage of telegrams to Barclay, which the latter posted at the Salt Lake Stock Exchange in order to stimulate the interest of brokers in Union stock. These telegrams described in glowing terms the progress of the drilling operation. They were stopped just a few days before well No. 1 came in, only because it was considered that their promotional nature might hamper the efforts to get the stock relisted on the exchange. Well No. 1 began to produce oil on December 14, 1938, and reached its highest production—124 barrels—the next day. The conspirators were disappointed in that their efforts to raise the market price of the stock had not fully succeeded.

Undaunted, the conspirators hit upon another device to raise the market price of Union stock. This device, which involved Collins in the scheme, was the graduated price scale option contract. Fischgrund prepared a contract which provided for the sale to Collins by Plymouth of 1,000,000 shares of stock in 12 equal monthly installments beginning on or before February 1, 1939, at prices increasing from 2½¢ to 30¢ per share. Obviously, for Collins and his associates to make a profit under the circumstances, the conspirators had to use artificial means to boost the price of the stock progressively upwards and above the option price

each month. In *S. E. C.* v. *Torr*, 22 F. Supp. 602, 604 (S.D.N.Y. 1938), Judge Woolsey said of a similar option contract, which he held to be a manipulative device:

> "This [contract] indicated a hope at least, if not a purpose, that the market should also go up if it were possible to raise it. Otherwise there would be naught in it . . .
>
> * * * *
>
> "This arrangement . . . constituted a joint venture between . . . the participants in the net profits.
>
> "Their objective necessarily was the distribution of the . . . stock . . . at a profit over the call prices."

See also *Wright* v. *S. E. C.*, 112 F. 2d 89 (C.C.A. 2, 1940).

The jury could infer from the terms of this contract, in the light of the surrounding circumstances, that a fraudulent scheme to elevate the price of Union stock was contemplated and that Collins and the other appellants, who stood to profit from the deal with Collins, must have been aware of its fraudulent nature. Certainly the jury was entitled to believe that the purpose as well as the effect of this contract was to fix a progressively higher price for the stock which was not based on the law of supply and demand operating in a free and open market. It is clear that the graduated scale of prices fixed by the contract was arbitrary, fraudulent in purpose, and had no relation to the assets of Union or to the productivity of the wells in which Union was assigned an interest by Plymouth.

In order for Collins to sell the stock at a price higher than he had to pay for it under the option agreement, he and his associates had to misrepresent the production of the wells and make false and highly colored statements about its prospects, both as to the listing on the exchange and the price of the stock when listing was obtained. As a result of their sales campaign Collins and his associates unloaded about 165,000 shares of Union stock on those investors who testified at the trial for prices as high as 4¢ a share (in March 1939).

Union received only $4115.22 from its interest in well No. 1 and with the help of Fischgrund it was enabled to disburse part of it as a 1/10¢ dividend on August 30, 1939, over the objection of the Assistant Secretary of Union who had been a director before control of the company was acquired by the conspirators.

The payment of this dividend by Union represented the final effort of the conspirators to boost the price of the stock. It is significant that if the conspirators had not been using Union as a front for obtaining the confidence of investors, no dividend would have been possible. The total proceeds from this well up to that time was $8241.44. Drilling of the well cost about $38,000, which Plymouth under its contract with Union, had to pay. Plymouth also had to pay the 20% landowner's royalty. Obviously, even if Plymouth had not conveyed a half interest in this well to Union, the former would not have been in a position to pay a dividend. The transfer of this interest to Union shows how well the conspirators had planned—for this enabled them to get a dividend paid by Union in order to raise the price of the stock at a time when the well was being operated at a loss and the market activities were not as effective as hoped. With respect to well No. 2, the total proceeds from its production were likewise not sufficient to pay Plymouth's drilling expenses. Therefore, under the contract, Union received no income whatever from this well.[37]

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[37] This points up the fallacy in the opinion testimony of defendants' witness, Wents, who placed a $60,000 valuation on Union's overriding royalty in well No. 1 and a $40,000 valuation on Union's participating royalty in well No. 2, before the production of oil, and higher valuations after production (R. 516-7). His opinion that the value of these wells to Union after they came in was greater than while the wells were drilling is not borne out by the facts. And when it is considered that 2,294,000 shares of Union stock were then outstanding and that production from wells 1 and 2 was rapidly declining (at a time when Collins and his associates were making their sales of Union stock under the option contract) the value of Union stock, far from being much greater than the prices paid for

Appellants assert there is no evidence that Schirm and Collins knew each other or had ever met (Br. p. 26), or that Adkisson had "any discussion of any kind" with any of the appellants (Br. p. 29). However, it is not necessary for conviction that all conspirators be acquainted with each other or have previously associated together. Nor is it necessary that a defendant know all of the details of the plot nor all of the means whereby the object was sought to be accomplished. A conspiracy is shown if the parties acted together to accomplish an unlawful purpose, even though individual conspirators may have done particular acts in furtherance of the common unlawful design apart from and unknown to the others. *McGunnigal* v. *U. S.*, 151 F. 2d 162, 165 (C.C.A. 1, 1945), cert. denied 66 S.C. 267; *Braverman* v. *U.S.*, 125 F. 2d 283, 285-6 (C.C.A. 6, 1942), rev'd. on other grounds, 317 U.S. 49; *Coates* v. *U.S.*, 59 F. 2d 173 (C.C.A. 3, 1932); *Beland* v. *U.S.*, 100 F. 2d 289, 290-1 (C.C.A. 5, 1938), cert. denied 306 U.S. 636. In *Lefco* v. *United States*, 74 F. 2d 66, 68 (C.C.A. 3, 1934), the court states:

> "Common design is the essence of conspiracy. The crime may be committed whether or not the parties comprehend its entire scope, whether they act separately or together, by the same or different means, known or unknown to some of them, but ever leading to the same unlawful result. *Allen* v. *United States* (C.C.A.) 4 F. (2d) 688, 691; *McDonnell* v. *United States* (C.C.A.) 19 F. (2d) 801; *Capriola* v. *United States* (C.C.A.) 61 F. (2d) 5, 9; *Williamson* v. *United States*, 207 U.S. 425, 28 S. Ct. 163, 52 L. Ed. 278;

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it by investors, as appellants contend (Br. 31-2), was rapidly approaching zero.

Appellants attempt to support Wents' appraisal by arguing that if it cost $40,000 to drill well No. 1, the 635,000 shares would be worth at least $20,000, and that this figure must be raised to about $60,000 because Plymouth, in additional to paying the drilling expenses, had to pay the other expenses (Br. 32). The short answer to this argument is that these expenses have no bearing on the value of Union stock which must depend on the quantity of oil produced by the well.

Pierce v. *United States*, 252 U.S. 239, 243, 40 S. Ct. 205, 64 L. Ed. 542. All conspirators need not be acquainted with one another, nor need they have originally conceived or participated in the conception of the conspiracy. Those who come on later and coöperate in the common effort to obtain the unlawful results become parties thereto and assume responsibility for all done before. *Van Riper* v. *United States* (C.C.A.) 13 F. (2d) 961; *Coates* v. *United States* (C.C.A.) 59 F. (2) 173." [38]

In any event, appellants' assertion that Adkisson never discussed anything with the appellants is not borne out by the record. Adkisson testified (R. 184-5):

> "I know a man by the name of Schirm, and remember having a conversation with him with reference to his refusal to endorse a stock certificate. This was the latter part of December, 1938, in the office of the Plymouth Oil Company in Los Angeles and Schirm was asked to endorse the certificates of Union Associated Mines Company that stood in Schirm's name. Siens asked him to do it, and he said he would not, and when I asked him why, he said that Siens had promised him some stock, and when he asked Siens for it the other day, that he would not give it to him. For that reason he had refused to endorse the stock. Then I asked him if he would endorse it as a personal favor to me, and he said he would, and he did." [39]

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[38] Indeed, a conspiracy once having been established, relatively slight evidence is necessary to connect a party thereto. In *Tomplain* v. *United States*, 42 F. 2d 202, 203 (C.C.A. 5, 1930), cert. denied 282 U.S. 886, the court said:

"It may be conceded that the evidence connecting the four appellants with the transaction was not as strong as it might have been and was disputed. However, we need not review it, as we cannot say, as a matter of law, there was no evidence at all to go before the jury. The conspiracy was conclusively established, and but slight evidence connecting the defendants was necessary. If the conflict was resolved in favor of the government, it was sufficient to support the conviction. The question presented was essentially for the jury."

[39] It should also be noted that Adkisson and Collins were previously associated as employees of the same securities firm (R. 149).

It is submitted that the evidence introduced, as we have shown, abundantly supported the verdict that appellants were guilty of conspiracy.

Appellants contend that the verdicts are inconsistent because the jury acquitted Gordon and Morgan, whom appellants characterize as the "main defendants" (Br. 28, 29). This contention has no merit. *Kamanosuke Yuge* v. *U.S.*, 127 F. 2d 683, 691 (C.C.A. 9, 1942), cert. denied sub nom. *Mateus v. U.S.*, 317 U.S. 48; *Carter* v. *State of Tennessee*, 18 F. 2d 850 (C.C.A. 6, 1927); *American Medical Association* v. *U.S.*, 130 F. 2d 233 (App. D.C. 1942), aff'd. 317 U.S. 519; *Chiaravalloti* v. *U.S.*, 60 F. 2d 192 (C.C.A. 7, 1932); *Donegan* v. *U.S.*, 287 Fed. 641 (C.C.A. 2, 1922), cert. denied 260 U.S. 751. Further, as stated in *Carter* v. *State of Tennessee, supra* (18 F. 2d at p. 854):

> " 'In such case, if it be assumed that one of the verdicts is erroneous, there is at least as much reason to consider the verdict of innocence incorrect as there is to consider the verdict of guilt improper.' "

Appellants assert that Adkisson's testimony "on its face" shows that "he and everyone else who went into the transaction, went into it in the highest of good faith . . ." (Br. 33). This self-serving testimony does not demonstrate the good faith of the appellants. As stated in *U.S.* v. *Morley*, 99 F. 2d 683, 685 (C.C.A. 7, 1938), cert. denied 306 U.S. 631:

> ". . . Defendant has not necessarily established a case for a directed verdict in his favor by professing innocence and denying the existence of criminal intent. If the established facts and inescapable inferences are inconsistent with the accused's profession of innocence, it becomes the problem of the jury to weigh the evidence and determine, under proper instructions dealing with quantum of proof necessary to convict, the guilt or innocence of the accused."

Finally, appellants assume that the overt act necessary

to complete the crime of conspiracy must itself be unlawful (Br. 34). This assumption is, of course, erroneous.[40]

II

The Denial of Appellants' Motions to Quash the Indictment Is Not Reviewable; in Any Event, There Was No Error in the District Court's Ruling.

Appellants assign as error the lower court's denial of motions to quash the indictment (Br. 6; R. 48).[41] Without any showing of insufficiency of the evidence presented to the grand jury, appellants contend that the indictment "must" have been based on hearsay testimony because, they allege, only a government investigator and an Assistant United States Attorney appeared before the grand jury to testify.[42]

This assignment has no merit. In this circuit it has been uniformly held that "the denial of a motion to quash

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[40] "Although to support a charge of conspiracy there must be proof of an overt act, it need not be in itself a criminal act." *Rose* v. *U.S.*, 149 F. 2d 755, 759 (C.C.A. 9, 1945); *Heskett* v. *U.S.*, 58 F. 2d 897 (C.C.A. 9, 1932), cert. denied 287 U.S. 643; *Bergen* v. *U.S.*, 145 F. 2d 181 (C.C.A. 8, 1944).

[41] Appellants' brief seems to assume that all the appellants filed such a motion. In fact, Collins did not file a motion to quash. Fischgrund filed a motion (R. 44-6) while Schirm joined in defendant Gordon's motion to quash which made the same allegations as Fischgrund's motion (R. 39-41, 47).

[42] Fischgrund's and Schirm's motions were based on an affidavit filed by Gordon's counsel in support of Gordon's motion (R. 41-3, 46). Affiant alleged "on information and belief" that no witnesses appeared before the grand jury to testify except Evans, an investigator for the Securities and Exchange Commission, and Lambeau, an Assistant United States Attorney, that their testimony was incompetent and hearsay, and that "said allegation on information and belief is based on the fact that it would be a physical impossibility to hear sufficient competent evidence to justify the allegations in the indictment."

an indictment is not reviewable." *Conway* v. *U.S.*, 142 F. 2d 202, 203 (C.C.A. 9, 1944) and *Tudor* v. *U.S.*, 142 F. 2d 206, 207 (C.C.A. 9, 1944) and cases cited therein. A similar rule has been adopted by other courts. *U.S.* v. *Hamilton*, 109 U.S. 63; *Colbeck* v. *U.S.*, 10 F. 2d 401, 402 (C.C.A. 7, 1925), cert. denied 270 U.S. 663 and 271 U.S. 662; *McGregor* v. *U.S.*, 134 Fed. 187, 192 (C.C.A. 4, 1904).

Even if this were not the rule in this circuit, the assignment would be without merit. Appellants base their allegations of what transpired before the grand jury merely upon information and belief. Not being present in the grand jury room, they have no way of knowing whether the evidence presented to the grand jury was competent or not. They cannot know whether any documentary evidence was submitted to the grand jury or whether the witnesses who appeared testified to any admissions made by the defendants.

Appellants offered no proof on this issue; their belief that the evidence "must" have been hearsay is of no significance. See *Radford* v. *U.S.*, 129 Fed. 49 (C.C.A. 2, 1904); *Cox* v. *Vaught*, 52 F. 2d 562, 563 (C.C.A. 10, 1931); *Kastel* v. *U.S.*, 23 F. 2d 156, 158 (C.C.A. 2, 1927), cert. denied 277 U.S. 604; *Murdick* v. *U.S.*, 15 F. 2d 965 (C.C.A. 8, 1926), cert. denied sub. nom. *Clarey* v. *U. S.*, 274 U.S. 752. "Surmise, suspicion, belief, these are not sufficient bases for negativing the action of the Grand Jury, which is presumed to proceed according to law." *U.S.* v. *Krupnick*, 51 F. Supp. 982, 988 (D.C. N.J. 1943).

In the cases relied upon by appellants (Br. 7) there was an offer to prove that no evidence whatever or that no competent evidence of the offense charged was presented to the grand jury (*Brady* v. *U.S.*, 24 F. 2d 405 (C.C.A. 8, 1928); *Nanfito* v. *U.S.*, 20 F. 2d 376, 378 (C.C.A. 8, 1928)). That is clearly not the situation here. As the cases cited by appellants make clear, an indictment will not be quashed if there was any competent evidence before the grand jury to support it. *Murdick* v. *U.S.*, *supra* (15 F. 2d at p. 967); *An-*

derson v. *U.S.*, 273 Fed. 20, 29 (C.C.A. 8, 1921), cert. denied 257 U. S. 647.[43]

Appellants also contend that the district court abused its discretion in denying their alternative request for permission to examine the minutes of the grand jury in furtherance of their motions to quash (Br. 11). This contention likewise has no merit. Generally, the federal courts will not inspect or permit inspection of the minutes of a grand jury to determine whether the evidence is incompetent or insufficient, especially where, as in the instant case, the motion to quash merely alleges a conclusion that the evidence before the grand jury was hearsay and incompetent. *Cox* v. *Vaught*, 52 F. 2d 562, 564 (C.C.A. 10, 1931); *U.S.* v. *Goldman*, 28 F. 2d 424, 431 (D. Conn., 1928); *U. S.* v. *Herzig*, 26 F. 2d 487 (S.D. N.Y. 1928). As the court stated in *Murdick* v. *U.S.*, *supra* (15 F. 2d at p. 968), cited by appellants:

> ". . . if the court is of necessity compelled to review the evidence before the grand jury, weigh the same as to whether it is sufficient to warrant returning an indictment, sift the competent from the incompetent to determine its effect upon the minds of the jurors, then a new abuse of criminal practice will become prevalent in the courts absolutely subversive of criminal procedure."

Nor were appellants, as they contend (Br. 12), deprived of their constitutional rights under the Fifth and Sixth Amendments to the Constitution. No showing was made that the indictment was illegally or wrongfully returned. Appellants' assignment relates only to the competency of the evidence introduced before the grand jury.

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[43] Appellants, on authority of *U. S.* v. *Swift*, 186 Fed. 1002 (N.D. Ill. 1911), seem to assume that the Penal Code of California governs procedure in the federal district courts in California with respect to motions to quash (Br. 9). The *Swift* case does not so hold, but was merely referring to cases decided in state courts under state statutes. See also *McKinney* v. *U.S.*, 199 Fed. 25 (C.C.A. 8, 1912).

This raises no constitutional question. See *U.S.* v. *Swift*, 186 Fed. 1002, 1018-9 (N.D. Ill. 1911).

Finally, appellants cite the new Federal Rules of Criminal Procedure which authorize the district court to direct disclosure of the grand jury proceedings upon a showing that grounds may exist for a motion to dismiss the indictments because of matters occurring before the grand jury (Rule 6(e)). Apart from the fact that disclosure is made discretionary with the court upon cause shown, these rules did not become effective until March 21, 1946 (14 U.S. L.W. 2554, March 26, 1946), long after the termination of the trial and therefore, we submit, do not apply to the present case. See Rule 59.

III

Appellants Were Not Denied a "Speedy Trial"

Appellants assign as error the district court's denial of their motion to dismiss the indictment on the ground that they were denied the speedy trial guaranteed by the Sixth Amendment to the Constitution.[44] Appellants were indicted on February 4, 1942, on the basis of transactions occurring in 1938 and 1939, and the trial commenced on July 5, 1945. Their contention is essentially that they were "lulled into a point of inactivity" because on June 2, 1942, when they were ready for trial, an Assistant United States Attorney stated in open court that he had written for authority from the Attorney General to dismiss the case because he was convinced there was insufficient evidence to convict (Br. 13, 16).[45] Thereafter, the case was continued several times

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[44] Appellants also assign as error the court's denial of their motions for an early trial. The record contains no such motions, nor is this assignment discussed in their brief (Cf. Br. 15).

[45] Although appellants ostensibly rely on the grounds set out in the motions to dismiss which appear in the record at pages 49-90, they apparently have abandoned the contention made in Fischgrund's affidavit that the S.E.C. attorneys knew

and finally was set for trial for July 5, 1944 (R. 53-4). Except for one continuance on the district court's own motion (Br. 13), the defendants at the several calendar calls of the case either requested adjournments on the ground that they were not ready to proceed to trial or consented to adjournments by the court for the purpose of fixing a trial date (R. 87). Appellants concede that they never demanded a trial (Br. 15).

This assignment is without merit. Apart from the fact that there was no undue delay, it is well settled in the federal courts that the provision in the Constitution for speedy trial is a personal right which is waived by the failure of the accused to demand trial. *Pietch* v. *U.S.*, 110 F. 2d 817 (C.C.A. 10, 1940), cert. denied 310 U.S. 648; *Daniels* v. *U.S.*, 17 F. 2d 339 (C.C.A. 9, 1927), cert. denied 274 U.S. 744; *Phillips* v. *U.S.*, 201 Fed. 259 (C.C.A. 8, 1912); *Worthington* v. *U.S.*, 1 F. 2d 154 (C.C.A. 7, 1924), cert. denied 266 U. S. 626; *Carter* v. *State of Tennessee*, 18 F. 2d 850 (C.C.A. 6, 1927); *O'Brien* v. *U.S.*, 25 F. 2d 90 (C.C.A. 7, 1928).[46]

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that the action would not be dismissed, but from "whim and caprice" refrained from so advising the court and defendants (R. 62). As pointed out in the affidavit filed by the Government in opposition to the motion to dismiss, only the Department of Justice can allow a request of the United States Attorney for leave to dismiss a criminal case (R. 85).

[46] In *Pietch* v. *U. S., supra,* in circumstances similar to those in the present case, it was presumably argued that the communicated intention of the United States Attorney to obtain dismissal of the prosecution, excused appellant's failure to demand trial. No objection or protest to the court was made respecting the delay. A motion to dismiss the indictment on account of the delay was filed, but it was filed more than three years after the return of the indictment, and, as in the present case, it was a motion to dismiss—not a demand for trial. The court, holding that appellant's right under the Constitution to a speedy trial was not denied, said (110 F. 2d at p. 819):

"A person charged with a crime cannot assert with success that his rights to a speedy trial guaranteed by the Sixth Amendment to the Constitution of the United States has been invaded unless he asked for a trial. In the absence of an affirma-

IV

The Conspiracy Count Sufficiently Charged an Intent to Use the Mails and the Evidence Was Sufficient to Sustain the Charge.

Appellants assign as error the district court's denial of motions for arrest of judgment and to vacate the judgments of conviction notwithstanding the verdicts, on the grounds that the conspiracy count of the indictment does not specifically allege an intent to use the mails, and that the evidence does not show such an intent (Br. 35, 38).

This assignment has no merit. The conspiracy count sufficiently charges an intent to use the mails as well as other instrumentalities in interstate commerce in carrying out the scheme to defraud.[47] Defendants are charged in count 11 with conspiring with Siens, Barclay, Adkisson and Davis wilfully to violate Section 17(a) (1) of the Securities Act and the mail fraud statute,

> "and among such violations to commit the divers offenses charged against the said defendants in the First to

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tive request or demand for trial made to the court it must be presumed that appellant acquiesced in the delay and therefore cannot complain."

The only federal case cited by appellant to support their assignment of error (*U. S.* v. *Henning*, 15 F. 2d 760 (C.C.A. 9, 1926)) is irrelevant. It merely holds that a defendant serving a prison sentence for a different offense is entitled to a speedy trial like everyone else. Indeed, he demanded trial, and eventually petitioned for mandamus to compel the court to order an immediate trial.

[47] It is of course well settled that in order to sustain a charge of conspiracy to violate the mail fraud statute, it is essential to prove an intent not only to defraud, but also to defraud by the use of the mails. *Oliver* v. *U. S.*, 121 F. 2d 245, 250 (C.C.A. 10, 1941), cert. denied 314 U.S. 66; *Morris* v. *U. S.*, 7 F. 2d 785 (C.C.A. 8, 1925), cert. denied 270 U.S. 640; *Farmer* v. *U. S.*, 223 Fed. 903 (C.C.A. 2, 1915), cert. denied 238 U.S. 638. The same rule would apply with respect to the use of the mails or interstate instrumentalities under Section 17(a) (1) of the Securities Act.

> Tenth Counts, inclusive, of this indictment, the allegations of which Counts, descriptive of the said defendants in the sale of the common stock of Union Associated Mines Company *by the use of the United States mails*, employing a scheme and artifice to defraud, and of the connections of said defendants therewith, and descriptive of the *defendants' use of the United States mails in furtherance of the said scheme as they had devised it*, are hereby incorporated by reference to said First to Tenth Counts, inclusive . . ." (R. 33-4). (Italics supplied.)

We submit that the above-quoted portion of the indictment constitutes an explicit allegation of a purpose to make use of the federal facilities. Moreover, an explicit allegation was not required since it is settled law that a charge of conspiracy to commit violations of these statutes in itself constitutes a sufficient allegation of an intent to use the mails or interstate instrumentalities in carrying out the scheme to defraud. *Oliver* v. *U.S.*, *supra; U.S.* v. *Womack*, 98 F. 2d 742, 744 (C.C.A. 7, 1938); *U.S.* v. *Shurtleff*, 43 F. 2d 944, 948 (C.C.A. 2, 1930); *Chew* v. *U.S.*, 9 F. 2d 348, 352 (C.C.A. 8, 1925); *Morris* v. *U.S.*, *supra;* and see *Rose* v. *U.S.*, 149 F. 2d 755, 758 (C.C.A. 9, 1945). As stated in *Morris* v. *U.S.*, *supra* (7 F. 2d at p. 790):

> "The nineteenth count of the indictment does not seem to contain a specific and clear allegation of intent, but it does charge an agreement to do the things which would be a violation of section 215 of the Criminal Code, and said section could not be violated without the use of the mails. The charge of an agreement to violate section 215 is a charge of an intention to use the mails in carrying out the scheme to defraud. *Frohwerk* v. *United States*, 249 U.S. 204, 39 S. Ct. 249, 63 L. Ed. 561. The indictment very clearly shows that the conspiracy alleged contemplated the use of the United States mails to a very great extent."

With respect to the contention that an intent to use the mails was not proved, we submit that the evidence in the case amply justified the jury in finding that the con-

spiracy shown by the evidence included an agreement to use the mails and interstate instrumentalities in carrying out the scheme to defraud in the sale of Union stock. The record is replete with evidence that it was a part of the conspiracy to use the mails and interstate commerce and that such were in fact used in connection with the conspiracy, both between the conspirators themselves and the conspirators and purchasers of Union stock. Each of the first ten counts of the indictment and most of the overt acts listed in count 11 recite uses of the mails. In the statement of facts we cite the great number of letters and telegrams sent by the conspirators and the frequent interstate trips made in furtherance of the scheme.

From the nature of the plan, it is clear that the mails and facilities of interstate commerce would have to be used to effectuate it. Plymouth and the Torrance oil field were in Los Angeles, California, while Union was in Salt Lake City, Utah. Some of the defendants and conspirators operated in Los Angeles while others functioned in Salt Lake City. Since it was contemplated that control of Union be acquired by the conspirators and that Union transfer large blocks of its stock to Plymouth, frequent intercourse between the two companies and the conspirators was not only foreseeable but essential in carrying out the scheme. Also, the market manipulation contemplated the use of the mails and the facilities of interstate commerce, including the stock exchange. For the conspirators to keep in touch with each other, it is inferable that they would travel between California and Utah as well as use the mails. In addition, the mails would obviously have to be used in selling securities.

It is well settled that an intent to use the mails may be shown by circumstantial evidence. *Blue* v. *U.S.*, 138 F. 2d 351 (C.C.A. 5, 1943), cert. denied 322 U.S. 736, 737, 771; *Oliver* v. *U.S.*, 121 F. 2d 245, 250 (C.C.A. 10, 1941), cert. denied 314 U.S. 66; *U.S.* v. *Rowe*, 56 F. 2d 747, 750 (C.C.A. 2, 1932), cert. denied 286 U.S. 554; *Burns* v. *U.S.*, 279 Fed. 982, 986 (C.C.A. 2, 1922); *Preeman* v. *U.S.*, 244

Fed. 1, 18 (C.C.A. 7, 1917), cert. denied 245 U.S. 654; *Farmer* v. *U.S.*, 223 Fed. 902, 907 (C.C.A. 2, 1915), cert. denied 238 U.S. 638. As stated in *Blue* v. *U.S.*, *supra* (138 F. 2d at p. 361):

> "With regard to the intent to use the mails, it is the rule that where the accomplishment of the conspiracy contemplated the use of the mails, and such use for the execution of a scheme was essential, intent on the part of the conspirators to use the mails may be inferred (Oliver v. United States, 10 Cir., 121 F. 2d 245); and if in the carrying out of the conspiracy, the use of the mails is indispensable, the intent to use the mails as part of the conspiracy is thereby sufficiently shown, and all who participate in the scheme would be guilty of conspiracy to use the mails to defraud, although they might not themselves make use of the mails. Preeman v. United States, supra. It is enough to show that the mails were used and that the scheme was one which reasonably contemplated the use of the mails. Spivey v. United States, 5 Cir., 109 F. 2d 181."

V

There Was No Error in the Receipt of Evidence

A. *The Minutes of Union* (GX 6).

Appellants do not object to the authenticity of this exhibit, but contend that it was hearsay with respect to all the defendants except Morgan, who was an officer and director of Union (Br. 46). There is no merit in this contention. The minutes of a meeting of a corporate board of directors are not hearsay at all. As stated in *Wigmore, Evidence* (3d ed. 1940), Vol. IV, § 1074:

> "The record [of a meeting] is not somebody's hearsay testimony to the act; it is the act itself." [48]

However, even if this exhibit is regarded as hearsay with respect to Morgan's co-defendants, it was properly re-

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[48] Citing *Owings* v. *Speed*, 5 Wheat. 420, 422 (1820); *Sigua Iron Co.* v. *Brown*, 171 N.Y. 488, 64 N.E. 194 (1902); *People* v. *Burgess*, 244 N.Y. 472, 155 N.E. 745 (1927).

ceived in evidence as an exception to the hearsay rule. The law is well settled that if a conspiracy is shown, declarations and acts of one conspirator in furtherance of the business of the conspirators are admissible against the co-conspirators. See *Cornes* v. *U.S.*, 119 F. 2d 127 (C.C.A. 9, 1941), which also involved corporate minutes. Also see *U.S.* v. *Von Clemm*, 136 F. 2d 968, 971 (C.C.A. 2, 1943), cert. denied 320 U.S. 769.

Nor does the acquittal of Morgan affect the admissibility of these minutes. Obviously, the district court could not foresee that Morgan would be acquitted. In *Kamanosuke Yuge* v. *U.S.*, 127 F. 2d 683, 688-9 (C.C.A. 9, 1942), cert. denied sub nom. *Mateus* v. *U.S.*, 317 U.S. 48, this court stated:

> ". . . where there is evidence to connect one co-defendant with a conspiracy, the fact that the jury fails to convict him of the conspiracy charged does not in and of itself render testimony of that person's acts and declarations inadmissible as against other alleged co-conspirators."

In any event, if this exhibit should be deemed inadmissible against Morgan's co-defendants, the error in receiving it did not prejudice appellants. Substantially the same matters covered by the minutes—the Union-Plymouth transactions—appeared in other admissible evidence (E. g. R. 145-6, 230, 244), and therefore the exhibit was merely cumulative. *Butler* v. *U.S.*, 138 F. 2d 977, 980 (C.C.A. 7, 1943).

B. *Testimony of Harold V. Dodd as to Oil Production in Devil's Den Area.*

Defendant Gordon leased to Union through Millener a 40-acre tract of land in the Devil's Den area. Dodd a deputy state oil and gas supervisor and petroleum engineer of the State of California (R. 328), gave testimony, based on official records, that the total production from the 20 wells which produced oil in this area (covering roughly 10,000

acres) in 1938, was 9,094 barrels. At the trial, defendants objected to this testimony on the ground of immateriality (Br. 47-8). They now argue that it is also incompetent as hearsay (Br. 49). This testimony we submit was clearly material to the charge in the indictment that the defendants, as part of their scheme to defraud, leased and assigned "unproven and undeveloped properties claimed by defendants to be of value to" Union and secured "for themselves from said corporation 235,000 shares of the stock of said corporation" (R. 5-6). Moreover, this testimony was also admissible as an exception to the hearsay rule, since Dodd testified in his capacity as a state official from an examination of production records required to be filed by persons drilling wells in the State of California (R. 328). *Wigmore, Evidence* (3d ed. 1940) Vol. I, §665.

C. *Testimony of Paul Julian Howard as to Assessed Value of Devil's Den Tract.*

This witness, who was the chief appraisal engineer of Kern County, and also served as assistant county assessor, testified that the official assessment in 1938 and 1939 of the oil and mineral rights in the tract in question was that they had no value (R. 345). Appellants contend that this testimony is immaterial (Br. 50-2). We submit that this testimony was clearly material to the question whether defendants leased to Union unproven and undeveloped land. Counsel for Collins and Fischgrund conceded that proven land would "probably" have a higher assessed value (R. 345).

D. *Testimony of Charles H. Shomate as to Title of Devil's Den Tract.*

This witness, the county recorder of Kern County, testified from an examination of the county records that on the date when Gordon and others leased the Devil's Den tract to Millener, one Blynn was the registered owner of the property (R. 349). His testimony was clearly relevant on the question whether Union, in taking an assignment of this lease, received valuable consideration for its surrender of

235,000 shares of stock to Plymouth, and is evidence also of the value of stock which is based on such dubious title. The district court properly recognized that the lack of registration in Gordon's name was evidence, though not conclusive evidence, of his lack of ownership (R. 348). Appellants' objection to this testimony as hearsay with respect to all the defendants except Gordon (Br. 68), is invalid for reasons discussed in Point V, A, *supra*, pp. 43-4. Accordingly, there was no error in refusing to strike this testimony.

However, if it were error, it was harmless. Defendants introduced testimony, which was not controverted, showing that Gordon had at least equitable title to the property and that Blynn held legal title as a straw party (R. 505-6).

E. *Testimony of Investor Witnesses Concerning Acts and Declarations of Murphy and McEvoy (see Br. 53-4, 55-61, 62-5, 67-8, 70-5) and Exhibits Pertaining to Their Transactions (GX 27, 28, 29, 50, 52).*

There is evidence in the record from which the jury could properly conclude that Murphy and McEvoy, though not specifically named in the indictment as defendants or co-conspirators, were among the "other persons, whose names are to the Grand Jurors unknown," who were included in the conspiracy charge in the indictment. The evidence shows that Murphy "was an even partner with Collins" in the graduated price scale option contract (R. 310) and that McEvoy occupied an office with Collins and Siens in the Plymouth office suite for the purpose of selling Union stock, and that he sold Union stock as a partner or in behalf of Collins under the latter's contract (R. 293-4, 296, 313, 550, 552-3). As noted above, once a conspiracy is established, the acts and declarations of one conspirator are admissible in evidence against his co-conspirators. Consequently, checks given to McEvoy for Union stock (GX 27, 28) and certain of the Union stock certificates issued to a customer of McEvoy (GX 29; R. 492), were properly admitted.

The check for Union stock (GX 50) which Tucker gave to a securities broker selected by Murphy (R. 493-4), and

the confirmation of the purchase (GX 52; R. 411), although relating to stock not covered by the Collins contract, were properly admitted. Collins' participation in the scheme under his contract with Plymouth involved not only the sale of Union stock but also the manipulation of the market so as to make such sales profitable. Murphy, as Collins' associate, was at this point evidently furthering the manipulative purpose; Tucker's purchase of the stock through an outside broker would contribute to raising the market price of the stock. Consequently, Murphy's acts in this connection and the exhibits pertaining thereto were admissible against Collins and the other conspirators.

Even assuming Murphy and McEvoy were not involved in this conspiracy, the testimony of these investor witnesses and the exhibits in question were properly admitted. There was evidence, as we have shown, from which the jury could conclude that Collins directed the course of conduct which embraced these acts and declarations. Murphy and McEvoy were at least agents of Collins and it is settled law that acts and declarations of an agent authorized and directed by the principal are admissible against the latter. *U. S.* v. *S. B. Penick & Co.*, 136 F. 2d 413, 415-6 (C.C.A. 2, 1943).

F. *Testimony of Frank L. Tucker as to his Disposition of Union Stock Purchased by him.*

Tucker testified that he no longer held the Union stock which he purchased, having surrendered it to Plymouth and received a note therefor (R. 412). Appellants object to the materiality of this testimony because it relates to an event occurring after the date of the scheme laid in the indictment (Br. 54, 62). We submit that this testimony was properly admitted as showing the relationship between Union, Plymouth and the conspirators. In *Harper* v. *U.S.*, 143 F. 2d 795, 803 (C.C.A. 8, 1944), where a similar contention was made, the court stated:

> "In admitting testimony of attending circumstances, especially in cases involving allegations of

> fraud, much is left to the discretion of the trial court . . . Evidence outside of the scheme charged may be admitted which tends to elucidate or clarify false statements for the purpose of showing intent."

See also *Metzler* v. *U.S.*, 64 F. 2d 203, 207 (C.C.A. 9, 1933).

Nor is there any validity to appellants' objection that this testimony is hearsay (Br. 62). Tucker was describing his own acts and experience.

G. *Duplicate of Log of Oil or Gas Well (GX 41).*

Appellants contend that the district court erred in refusing to strike this exhibit from the record on the ground that no proper foundation was laid and because the exhibit narrates past events (Br. 66-7). This contention has no merit. This exhibit consists of two reports in duplicate of the oil production from wells Nos. 1 and 2, respectively, in the Torrance field. Such reports, under California law, must be filed with the State Division of Oil and Gas. They are dated September 26, 1939, and June 20, 1939, and describe for each well the initial production on, and the production 30 days after, December 14, 1938, and February 28, 1939, respectively. They were obtained from the Plymouth office.[49] We submit that no foundation was necessary since these reports were prepared by Plymouth in the regular course of business and pursuant to state law. 28 U.S.C.A. 695. In any event, any error in admitting them was cured and moreover did not prejudice appellants. Co-conspirator Davis testified he was in charge of Plymouth's records, and that he prepared and filed these reports (of which GX 41 is a duplicate) with the State Division of Oil and Gas (R. 553, 554, 557). Furthermore, his testimony indicates that the duplicate reports were correct copies of the reports which

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[49] See *Wigmore, Evidence* (3d ed. 1940), Vol. VII, § 2160, citing *Wikman's Estate*, 148 Cal. 642, 84 Pac. 212 (1906), to the effect that the presence of documents in a natural place is sufficient evidence of authenticity.

were filed (R. 557-8). He also confirmed the statement in the reports that the initial production from well No. 1 was 124 barrels (R. 557).

The statements in these reports constitute admissions and acts in furtherance of the conspiracy by those of the conspirators who controlled Plymouth. Therefore, the exhibit was properly admitted as an exception to the hearsay rule.

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In this case, involving many complicated transactions, it may be that a few items of evidence were admitted which perhaps might have been excluded. In the course of a hotly contested trial, it is not surprising that appellants are able to comb the record and pick out a few insubstantial items which might not be clearly admissible. Defendants made many objections, often on vague and general grounds, thus placing upon the trial court an unnecessarily heavy burden in deciding admissibility. However, assuming without admitting that some of the court's rulings may have been incorrect, we do not believe that appellants were prejudiced by any of the rulings made. See *U. S.* v. *Trenton Potteries Co.*, 273 U. S. 392, 404, where the Supreme Court stated:

> "The alleged errors in receiving and excluding evidence were rightly described by the court below as minor points. The trial lasted four and one-half weeks. A great mass of evidence was taken and a wide range of inquiry covered. In such a case a new trial is not lightly to be ordered on grounds of technical errors in ruling on the admissibility of evidence which do not affect matters of substance."

See also *Simons* v. *U. S.*, 119 F. 2d 539, 559 (C.C.A. 9, 1941), cert. denied 314 U. S. 616.

The jury returned its verdicts upon instructions which were eminently fair to the defendants. No error was assigned to the charge. Indeed, counsel for appellants Collins and Fischgrund expressed satisfaction with the charge (Tr. 1696).

CONCLUSION

Appellants had a fair trial. The evidence was clearly sufficient to sustain the charge of conspiracy. We believe that we have established that the trial court's rulings were correct. If any error occurred, appellants were not prejudiced thereby. The convictions should be affirmed.

Respectfully submitted,

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May 1946.